CASE NO. 16-72174

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

GARY ELIAS

Intervenor,

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADY, LOCAL 720, AFL-CIO,

Respondent.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD CASE NO. 28-CB-131044, 363 N.L.R.B. NO. 148

PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING *EN BANC*

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ISSUED PRESENTED

Pursuant to Federal Rules of Appellate Procedure 35 and 40, Respondent hereby requests rehearing by the panel and rehearing *en banc* on two rulings issued by the panel. Those issues are as stated as follows:

1) Whether the National Labor Relations Board can order a remedy regulating a union and its relationship with employers where the Board does not establish jurisdiction over those employers?

2) Whether significant privacy issues override a union's obligation to provide the addresses and phone numbers of hiring hall users where the union objects on privacy grounds and has an alternative means upon which hiring hall users can be contacted?

As to the first issue, the panel's decision conflicts with every NLRB or Court decision where a party has contested the jurisdiction of the Board over an employer. In every case, the Board, or the Court reviewing the Board's decision, has had to determine whether there was jurisdiction over each employer involved in order to find a violation of the Act as to the employer or the labor organization. This decision contradicts that principle.

As to the second issue, the Board and the panel disregarded the privacy interests of hiring hall users and ordered the Union to turn personal phone numbers and addresses over to an individual without restriction, relying on a series of cases that arose from times when phone numbers were readily accessible by the public and where unions waived any privacy concerns by freely providing that information without protecting the privacy interests of hiring hall users. Although the panel's decision does not conflict directly with any decision of this Court or other court of appeals, it conflicts with the basic notions of privacy rights of hiring hall users as to their personal contact information.

I. INTRODUCTION

The panel's decision that the Board was not required to establish jurisdiction over each employer upends labor law under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169.

It is fundamental that before the Board can act, there must a "labor dispute" concerning an employer over which the Board has jurisdiction. This requirement extends to those cases where an employee claims the union violated the duty of fair representation with respect to dispatching him to employers. A union only owes a duty of fair representation to employees because the union is the exclusive representative for the employees of an employer. *See Vaca v. Sipes*, 386 U.S. 171 (1967). The Board may not regulate a union or its relationship with an employer without finding that the employer is a statutory employer over which the Board has jurisdiction.

Here, the Board only found that it had jurisdiction as to one employer, but then found that the Union owed a duty of fair representation towards one member concerning all other putative employers. As to all other putative employers, there was no finding of commerce jurisdiction, no finding of discretionary jurisdiction, and no finding that the putative employer was even an employer within the meaning of the Act. By holding that establishing jurisdiction over one employer gives the Board the ability to regulate the union in its relationship with all putative employers, the Board and the panel have expanded the National Labor Relations Act far beyond its purpose to regulate labor disputes between labor organizations and employers as defined by the Act.

The second issue requiring review simply involves one of privacy. Although the Union concedes that Mr. Elias is entitled to the names of individuals who were referred, the Union insists that under current precepts of personal privacy, it should not have to disclose the home addresses and phone numbers of

thousands of individuals without seeking their permission to do so or giving them an opportunity to opt out.

II. STATEMENT OF THE REASONS THE PETITION FOR REHEARING SHOULD BE GRANTED

A. The Board and the panel erred by ordering the Union to turn over information about hiring hall referrals to putative employers without finding jurisdiction over those putative employers

1. The charging party made requests for information concerning many putative employers and the Board found jurisdiction over only one employer

In 2014, Gary Elias made two information requests about individuals who were referred by the Union. The first one, in February, involved only one show that was put on by LV Theatrical Group at the Venetian Casino. The Board did not establish jurisdiction over either LV Theatrical Group or the Venetian Casino.

Mr. Elias's request in April sought much more extensive information about referrals to several putative employers, including information about one show (the "Mama Mia" show) at the Tropicana. E.R. 73.

The Board found jurisdiction over the Tropicana, but did not find jurisdiction over any of the other putative employers. E.R. 3. Nevertheless, the Board required the Union to provide information about referrals to those other putative employers, and the panel affirmed that ruling.

2. The Board's decision as enforced by the panel significantly alters the scope of the Act by extending the duty of fair representation to employers over which the Board has not asserted jurisdiction

The Board's finding, as affirmed by the panel, will have a significant impact on the administration of the NLRA.

The Board expressly held that so long as jurisdiction exists over one employer, the Board would have jurisdiction as to the Union's dealings with every other putative employer. This holding improperly extends the Board's jurisdiction to remedy unfair labor practices over labor organizations. Even if an employer is a

public employer or other entity deliberately excluded from the Board's jurisdiction, the Board will nevertheless be able to regulate a union's representation of that employer's employees (including its referral system with respect to that employer) as long as the union has a relationship with one covered employer. This is a substantial expansion of the Board's jurisdiction over labor organizations, and extends the union's duty of fair representation to employers over which the Board has not asserted jurisdiction.

This decision is contrary to Board decisions, decisions of this Court, and decisions of other Circuit Courts, which have expressly required in many varying circumstances that there to be an explicit finding of jurisdiction over all employers that are subject to the labor dispute.

3. Because the record fails to establish jurisdiction over any employer other than the Tropicana, the panel incorrectly held that the Board could impose an obligation on the Union's actions beyond the Tropicana

The Board's conclusion that the Board's jurisdiction over one employer imposes on the Respondent a duty of fair representation with respect to Respondent's referral arrangements with unidentified employers is inconsistent with Board precedent and the Courts' treatment of the threshold jurisdictional requirement.

There are three jurisdictional requirements as to employers, which must be met in every case:

First, the Board must establish statutory jurisdiction, which is equivalent to Commerce Clause jurisdiction. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Here, there is no evidence in the record as to any employer except Tropicana.

Second, the Board must establish discretionary jurisdiction. *Siemons Mailing Serv.*, 122 N.L.R.B. 81 (1958). The Board limits its exercise of

jurisdiction "to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce," *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 636 (1950), and established standards for the exercise of this discretion in 1958. *Siemons Mailing Serv.*, 122 N.L.R.B. at 83-84; 29 U.S.C. § 164(c)(1). There is no evidence in the record as to any employer except Tropicana.

Third, the Board must establish that the employer is an employer within the meaning of the Act. 29 U.S.C. § 152(2). The Board does not have jurisdiction over public employers,[1] independent contractors,[2] certain religious institutions[3] and tribal enterprises,[4] and other entities that do not qualify as employers within the meaning of the Act.[5] This requirement was never reached because the record contains no evidence as to the nature of those other employers.[6]

None of these jurisdictional requirements were met. The Board cannot assert jurisdiction unless the jurisdictional standards are met by sufficient proof in the record. Where the record does not establish that the employer meets the jurisdictional standards of the Board, the complaint is dismissed. *See, e.g.*, *Pickle Bill's, Inc.*, 224 N.L.R.B. 413, 414 (1976) (dismissing all allegations on jurisdiction

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[1] *NLRB v. Nat. Gas Util. Dist. of Hawkins County, Tenn.*, 402 U.S. 600, 605 (1971).

[2] *Nw. Univ.*, 362 N.L.R.B. No. 167 (Aug. 17, 2015).

[3] *Pac. Lutheran Univ*, 361 N.L.R.B. 1404 (2014).

[4] *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1063 (2004).

[5] *See Fed. Express Corp.*, 317 N.L.R.B. 1155, 1156 (1995).

[6] The panel's assumption that jurisdiction over a labor organization is enough to meet this requirement ignores the common fact that many labor organizations represent both private sector employees governed by the NLRA and public sector employees over whom there is no NLRA jurisdiction. Some may have employees subject to other laws such as Railway Labor Act or the California Agricultural Labor Relations Act or even employees governed by no law such a racetrack employees. For this reason, evidence is needed as to the nature of each employer.

except violation of Section 8(a)(4) of the NLRA, 29 U.S.C. § 158(a)(4)); *Casey Welding Works*, 107 N.L.R.B. 929, 930-31 (1954).

Fisher Theatre, 240 N.L.R.B. 678, 679, 690 (1979), makes it clear that the finding of jurisdiction over one employer with which a union has an exclusive hiring hall arrangement does not enable the Board to exercise jurisdiction over the union's relationship with any other employer.

A close reading proves this point. In that case, a union representing workers in the entertainment industry was charged with an unfair labor practice concerning the operation of its exclusive hiring hall. There were four theatres involved. There was no multiemployer unit.

As to the first theatre, the Fisher Theatre, the parties agreed there was jurisdiction, and the Board found that both the union and the employer engaged in an unfair labor practice as to that theatre. As to second theatre, the Ford Theatre, the Board found jurisdiction and found an unfair labor practice even though the union and employer contested jurisdiction. As to the third theatre, the Music Hall, jurisdiction was disputed, and the Board avoided the question since it found no violation. But as to the Olympia Theatre, the record did not establish jurisdiction, and the allegations as to the union and that employer were dismissed for lack of jurisdiction. The allegations were dismissed even though the union conceded that it maintained an exclusive hiring hall with that theatre, and even though the Board found that the union had a relationship with two other employers over which the Board had jurisdiction. The Board could not regulate the union's operation of its hiring hall as to the Olympia Theatre because the record did not establish jurisdiction as to that theatre:

> However, I do not find that the Local violated the Act by failing to refer Masinick to the "Ice Capades" show at the Olympia Stadium. There is no evidence that the Olympia Stadium is itself engaged in commerce within the

> meaning of the Act or meets the Board's jurisdictional standards, or that it is part of a multiemployer unit which includes employers who are so engaged.

240 N.L.R.B. at 690. Consequently, the remedy issued by the Board was expressly limited to those theatres over whom jurisdiction was established: "In addition, Respondent Local 786 will be required to refer employee Masinick . . . and refer employees Craig and Misko to employment without regard to their failure to pay the fines levied against them, to employers over whom the Board would assert jurisdiction." *Id.* at 695.

The critical phrase "over whom the Board would assert jurisdiction" appears eleven times in the Decision, including the required notice. In this case, the Respondent is required to produce dispatching records without regard to Board jurisdiction.

Ultimately, the Board carefully conducted an analysis as to each employer. When jurisdiction over an employer could not be established by agreement of the parties or evidence placed on the record, the Board expressly rejected any finding as to the union in its relationship to the employer over which it could not establish jurisdiction.

This case is dispositive. Because the record here fails to establish jurisdiction over any employer other than the Tropicana, the Board may only regulate the Union's relationship with the Tropicana, and may not impose obligations on the Union in its relationship to other employers beyond the Tropicana.

The panel misconstrues *Fisher Theatre* in a footnote claiming that because the remedy sought by the union member required both the employer and the union to stop discriminating in referring hiring hall users for employment, it does not

apply here where "the remedy is directed solely at the union."[7] The panel's characterization of the case is correct to the extent that two employers (Fisher and Ford theatres) were held responsible for the failure to hire employees, and that the Board had to establish jurisdiction over those employers for the purpose of finding a violation of Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), by each of the employers as well as Section 8(b)(1)(A) and 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(1)(A) and (b)(2), by the union. But there was also a charge against the union under Section 8(b)(2) and 8(b)(1)(A) of the NLRA based on the union's failure to refer the member. The Board was precise that no action could be taken against the union unless jurisdiction existed as to each employer, as the remedy was limited only to those employers "over whom the Board would assert jurisdiction." *Fisher Theatre* stands then for the exact proposition we have asserted all along: that before a violation of the union's obligation to a hiring hall user can be found, jurisdiction over each employer must be established.

This is grounded in the requirement to find jurisdiction over each employer, which has been the uncontested rule in many situations. *See Marty Levitt*, 171 N.L.R.B. 739, 740 (1968) (jurisdiction over one employer could not be established by aggregating other employers); *L.A. County Dist. Council of Carpenters*, 115 N.L.R.B. 43, 44 (1956) (although jurisdiction might exist as to other employers with whom there is bargaining relationship, lack of jurisdiction over employer involved in dispute absent proof of multi-employer association); *S.F. Local Joint Exec. Bd. of Culinary Workers v. NLRB*, 501 F.2d 794, 796–97 (D.C. Cir. 1974), *enforcing*, 201 N.L.R.B. 36 (1973); *Orange County Dist. Council*

[7] This characterization of the remedy in this case is also inaccurate. The remedy isn't "directed solely at the union." It regulates the Union as to several employers other than the Tropicana and orders the Union to turn over information about referrals to employers other than the Tropicana, in direct contrast to the limited remedy in *Fisher Theatre.* The other putative employers have an interest in any disclosures about their hiring and referral practices.

of Carpenters, 219 N.L.R.B. 993, 995 (1975) (dismissing complaint against union where no jurisdiction as to individual employer). The Board cannot decline to find the essential threshold requirement of jurisdiction over each employer on the ground that Respondent is a labor organization

The panel erred in holding that because "the National Labor Relations Act . . . applies to the Union, . . . the Board had jurisdiction." The panel's rationale for finding jurisdiction over the union with respect to all potential employers because it has jurisdiction over the union with respect to one employer is inconsistent with the statute and has never been accepted by the Board.

There is no such legal doctrine that jurisdiction is established over a labor organization because it is a labor organization within the meaning of the Act. No case supporting this conclusion was cited by the Board.

Although the Union may be a labor organization within the meaning of the NLRA with respect to the Tropicana, that does not mean it is also a labor organization in its relationship with all putative employers. It can only be a "labor organization" if it is organized for "dealing with *employers* concerning grievances, labor disputes [etc.]." 29 U.S.C. § 152(5) (emphasis added). Thus, the word "employer," as defined by the Act, limits the meaning of "labor organizations" to those that have a relationship with an entity that is demonstrated to be an employer within the meaning of 29 U.S.C. § 152(2).

The Board has expressly held that a hiring hall violation may only be found as to the employer over whom jurisdiction was established. *Millwrights Local No. 1102*, 322 N.L.R.B. 198, 203 (1996); *see Local Union 370, United Bhd. of Carpenters*, 332 N.L.R.B. 174, 175 (2000) (no obligation to provide records if hiring hall is not exclusive); *Teamsters Local 460*, 300 N.L.R.B. 441 (1990); *Dev. Consultants*, 300 N.L.R.B. 479, 480 (1990).

This Court has turned down the Board's application to enforce orders absent proof of jurisdiction over the employer involved. *See NLRB v. First Termite Control Co.*, 646 F.2d 424 (9th Cir. 1981), *denying enforcement to* 247 N.L.R.B. 684 (1980), *on remand*, 265 N.L.R.B. 1558 (1982) (curing the jurisdictional defect); and *NLRB v. Peninsula Ass'n for Retarded Children & Adults*, 627 F.2d 202 (9th Cir. 1980).

Neither the panel nor the Board cited one case upholding jurisdiction over all the activities of the labor organization because one employer meets the Board's standards. The panel's decision imposes a duty of fair representation on the Union as to all putative employers without regard to jurisdiction. That result upends the limited jurisdictional grants Congress gave to the Board, which are limited to those employers over whom the Board can establish jurisdiction as a matter of commerce and as a matter of the nature of that putative employer. This rationale would affect a "mixed" union, of which there are many, which represents the employees of a few private sector employers and many employees of public sector employers. A "mixed" union would have the duty of fair representation imposed on the union as to the public employers because of its status as a "labor organization" as to a small minority of its represented membership. Unless an employer over whom the Board has jurisdiction is involved, there is no labor dispute, no labor organization, and no employee within the meaning of the Act.

B. The Court erred in requiring the Union to provide addresses and phone numbers of hiring hall users

There can be no doubt that in this era, privacy in personal contact information is a pressing concern. Mr. Elias made it clear that he would only accept the information he requested if it included the addresses and phone numbers of the individuals who use the hiring hall. He stated that it was "absolutely necessary." The Union acknowledges that the names of hiring hall referents are

necessary for Mr. Elias to determine whether he was properly referred, but the record does not establish the need to have addresses and phone numbers for these individuals.

The demand that the Union turn over phone numbers and home addresses of all hiring hall users implicates serious privacy concerns. The Union has a duty of fair representation to its hiring hall users to maintain their privacy and facilitate their use of the hiring hall. Moreover, Mr. Elias's request for addresses and phone numbers directly implicates hiring hall users' and the Union's and its members' First Amendment right to privacy in their associations. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958); *NAACP v. Button*, 371 U.S. 415, 430-31 (1963).

The Union recognizes that there is a line of cases in which the Board and this Court have affirmed the requirement that the phone numbers be provided despite these associational rights. This Court, in *NLRB v. Local Union 497, IBEW*, 795 F.2d 836, 839 (9th Cir. 1986), held that "disclosure of the names and addresses of all members using the hiring hall does not threaten the union or the associational rights of union members." In that case, however, there is no evidence that the union had maintained any effort to maintain the privacy of the names and addresses of the hiring hall users. Indeed, the union had allowed the names and addresses to be disclosed for various purposes.

Here, however, the undisputed testimony is that the Union did have a policy of keeping phone numbers and addresses confidential and protecting the privacy of this information, and that it enforced this policy. There is no evidence to the contrary, and the Board made no contrary finding. As the Union President testified, the Union's long-established policy and practice, where anyone seeks to contact a hiring hall user, is to inform the user that he or she received a telephone call and allow them to decide whether to communicate with the person trying to

get in touch with them. E.R. 45; *see also* E.R. 7, 47-48. Elias testified that he was aware this policy was enforced. S.E.R. 80. In light of the confidentiality policy maintained by the Union, the privacy interests at stake here cannot be dismissed.

Moreover, cases like *NLRB v. Local Union 497, IBEW*, 795 F.2d 836, are based on a dated understanding of privacy interests in contact information. The Board had previously held in a series of cases that phone numbers were not private because they could be obtained by a reverse phone directory. With the name of an individual and his or her address, the phone numbers could be located.

This is no longer true. Hiring hall users have cell phones. There is no way to find, easily, someone's cell phone number or home address simply because you have the person's name. Moreover, there is an important difference between a landline in the 1970s and a cell phone well into the second decade of the 21st Century. Cell phones are subject to much more abuse. Robo-calls, text messages for which cell phone users are charged, large texts of pictures and attachments, and other invasions of privacy are much more significant with cell phones than they were with landlines. There are many federal statutes that protect cell phones specifically from this kind of abuse.

The Board could not anticipate these changes in its now fifty-year old cases holding that phone numbers and addresses are not private. Meanwhile, many legal doctrines have developed that are applicable to the right of non-disclosure of contact information in a modern setting.

For example, under the Freedom of Information Act, 5 U.S.C. § 552, telephone numbers and addresses are regularly treated as private information and thus protected from disclosure. *See, e.g.*, *Lakin Law Firm, P.C. v. F.T.C.*, 352 F.3d 1122 (7th Cir. 2003) (shielding names and addresses from disclosure); *Strout v. U.S. Parole Comm'n*, 40 F.3d 136, 139 (6th Cir. 1994) (finding "a strong privacy interest" in names and addresses and shielding such information from disclosure).

California and other states use notice procedure to protect privacy of potential class action members. *See, e.g., Belaire-W. Landscape, Inc. v. Superior Court*, 149 Cal.App.4th 554, 562 (2007) (notice sent to class members to determine whether they want to opt out of being contacted further, thus protecting privacy interests).

The heightened protection for contact information is reflected in the NLRB's recently promulgated representation case procedures, which were amended to provide that "[t]he parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." 29 C.F.R. § 102.62(d). No such safeguard is in place here. The Board's order, as enforced by the panel, does not restrict the purposes for which Elias may use the list or limit Elias's ability to abuse, distribute, or even sell the information or use the contact information for his own personal gain.

This Court, other Circuit Courts and the Supreme Court, have emphasized that the rules about privacy or the rules about the use of phones, must be reevaluated in light of current technology. Even the Board has recognized that the rules in the workplace have substantially changed. By relying on a fifty-year-old case, which relies upon waiver doctrines, the Board has abdicated its responsibility to take into account the significant privacy interests of all others who use the hiring hall. The panel failed to remand to the Board so that it can explain why, under the circumstances of this case, the Union had to disclose, without any protective order or other protection, the home addresses and phone numbers of individuals who had at least some expectation of personal privacy.

III. CONCLUSION

For these reasons, this Petition for Rehearing and Petition of Rehearing *en banc*, should be granted.

Dated: January 31, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: David A. Rosenfeld

Attorneys for Respondent
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADY, LOCAL 720, AFL-CIO

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Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 16-72174

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 4,089 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: /s/ David A. Rosenfeld

Date: January 31, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

GARY ELIAS,

Intervenor,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 720, AFL-CIO, CLC,

Respondent.

No. 16-72174

Board No. 28-CB-131044

MEMORANDUM*

On Petition for Review of an Order of the
National Labor Relations Board

Argued and Submitted November 17, 2017
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: CLIFTON and FRIEDLAND, Circuit Judges, and GLEASON,** District Judge.

The National Labor Relations Board (the "Board") petitioned this court for enforcement of an order, requiring Local 720 (the "Union") to provide referral information to Union member Gary Elias. Pursuant to 29 U.S.C. § 160(e), this court has jurisdiction to review a final order of the Board. "We will uphold decisions of the Board if its findings of fact are supported by substantial evidence and if it correctly applied the law." *N.L.R.B. v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995). The Board's chosen remedy will "only [be] set aside by this court for 'clear abuse of discretion.'" *Int'l Bhd. of Elec. Workers, Local 21 AFL-CIO v. N.L.R.B.*, 563 F.3d 418, 423 (9th Cir. 2009) (quoting *Cal. Pac. Med. Ctr. v. N.L.R.B.*, 87 F.3d 304, 311 (9th Cir. 1996)).

The Union first asserts that the Board did not have jurisdiction to hear this dispute because it was required to have, but did not establish, jurisdiction over each employer to which the Union refers workers. However, the Board was not required to have jurisdiction over each individual employer because the sole remedy sought by Mr. Elias was an order requiring the Union to provide its own referral

** The Honorable Sharon L. Gleason, United States District Judge for the District of Alaska, sitting by designation.

information.[1] It is undisputed that the National Labor Relations Act (the "Act") applies to the Union. Accordingly, the Board had jurisdiction.

The Union next objects to the Board's finding that it operates an exclusive hiring hall. The record includes agreements that the Union had with various employers that require the employers to first use the Union's referral service. Therefore, substantial evidence supports the Board's finding that the Union operated an exclusive hiring hall.

The Union next maintains that Mr. Elias's claim is barred by the applicable statute of limitations. Under Section 10(b) of the Act, complaints cannot be filed more than six months after the "unfair labor practice." 29 U.S.C. § 160(b). In this case, the unfair labor practice occurred when the Union did not provide all of the requested referral information to Mr. Elias in early 2014. It is undisputed that Mr. Elias filed his complaint within six months of those events. Therefore, the statute of limitations does not bar Mr. Elias's complaint.

The Union next asserts that it should not be required to turn over addresses and phone numbers because Union members have a First Amendment right to

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[1] The Union relies on *Fisher Theatre* to support its claim. However, in *Fisher Theatre* the remedy sought and obtained by the union member required both the employer theater as well as the union to stop discriminating in referring union members for employment. 240 NLRB 678, 696 (1979). Here, the remedy is directed solely at the Union.

privacy and the Union has a duty to fairly protect the privacy rights of its members.[2] The Union is mistaken. In *N.L.R.B. v. Local Union 497, International Brotherhood of Electrical Workers, AFL-CIO*, 795 F.2d 836, 839 (9th Cir. 1986), this court held that "disclosure of the names and addresses of all members using the hiring hall does not threaten the union or the associational rights of union members."[3] Moreover, substantial evidence in the record supports the Board's finding that the Union did not have a confidentiality policy that was meant to protect the privacy of its members. Therefore, the Union is not precluded from providing the requested information to Mr. Elias.

Tina Elias was not a party to the complaint; nonetheless, the Board did not err in requiring the Union to provide the referral information as relevant to her. In *International Brotherhood of Electrical Workers, Local 24 (Mona Electric)*, 356 NLRB 581, 581–82 (2011), the Board found that a non-party to a complaint who was a witness in support of the allegations in the complaint and who was cross-examined at the Board hearing was active enough in the case to allow him to review the hiring hall records. In this case, Ms. Elias was similarly active in Mr.

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[2] The Union does not assert that there are First Amendment or other privacy interests at stake with Union members' priority rating for referrals.

[3] This reasoning logically extends to phone numbers; as the Union acknowledges, "telephone numbers . . . are analogous to addresses."

Elias's case. She was named in the second letter sent by Mr. Elias; she testified as a witness at the administrative hearing; and she was cross-examined by the Union. Therefore, the Board acted within its authority to accord the relief requested as to Ms. Elias.

Finally, the Union asserts that it is unclear from the Board's decision what referral information must be provided.[4] The Board ordered the Union to provide the referral information requested in Mr. Elias's two letters. Even if the April 24th letter was not entirely clear as to what Mr. Elias was requesting, the Board adopted the findings of the administrative law judge, which provided detailed clarification of what needed to be disclosed. Accordingly, the Board's order is sufficiently clear and will be enforced.

ENFORCEMENT GRANTED.

[4] The Union also asserts that Mr. Elias was not registered and eligible for referrals during the periods in question. But the Union ignores Mr. Elias's credited testimony. Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows that they are incorrect. *See Healthcare Emps. Union, Local 399, Affiliated With Serv. Emps. Int'l Union, AFL-CIO v. N.L.R.B.*, 463 F.3d 909, 914 n.8 (9th Cir. 2006). The Union points to nothing that rebuts Mr. Elias's testimony. Thus, substantial evidence supports the Board's decision.

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on January 31, 2018, I electronically filed and served the forgoing **PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC** with the United States Court of Appeals For the Ninth Circuit by using the Court's CM/ECF system.

I further certify that counsel for parties listed below are registered users who have been served through the CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on January 31, 2018.

/s/ Karen Kempler
Karen Kempler